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No. 82-855

In the Supreme Court of the United States

OCTOBER TERM, 1982

ALFRED S. JORDAN, PETITIONER

v.

WILLIAM F. BOLGER, POSTMASTER GENERAL OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioner contends that he was discharged as a probationary federal postal worker without receiving adequate prior written notice.

1. On July 2, 1977, petitioner was hired as a part-time clerk-carrier by the United States Postal Service in Aberdeen, Mississippi (Pet. 5). He was discharged while still in probationary status after receiving the following notice from his supervisor on August 24, 1977 (Pet. 5):

> Due to unsatisfied [*sic*] performance during your probationary period, your employment at the Aberdeen Post Office will be terminated at the close of the work day Friday August 26, 1977.

Petitioner thereafter filed suit in the United States District Court for the Northern District of Mississippi under the Age Discrimination in Employment Act of 1967, 29 U.S.C.

633a, and the Administrative Procedure Act, 5 U.S.C. 551 *et seq.*, alleging that his termination was arbitary and capricious and because of his age (Pet. App. B-1 to B-2).[1]

The district court dismissed the complaint with prejudice (Pet. App. B-1 to B-14, C-1 to C-2). The court expressly found that petitioner was fired because of his unsatisfactory work performance, which was documented in detail (*id.* at B-6 to B-7). Accordingly, the court rejected petitioner's contentions that his termination was arbitrary and capricious or constituted age discrimination. *Id.* at B-7, B-11 to B-14.[2] The court also found that the discharge notice was sufficient to comply with 5 C.F.R. 315.804 (1977), the regulation governing the type of procedural rights due probationary federal employees who are discharged for unsatisfactory conduct (Pet. App. B-11). The court of appeals affirmed summarily (*id.* at A-1 to A-2).

2. The decision of the court of appeals is correct and presents no issue that warrants this Court's review. As the courts below properly concluded, petitioner's right to notice prior to discharge, if it existed at all, was satisfied by the August 24, 1977 notice.[3]

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[1]Petitioner filed his complaint in this case after appealing his discharge to the Equal Employment Opportunity Commission, which remanded to the Postal Service for a hearing. The present action was commenced before that hearing could be held. The EEOC was named as a defendant, but was dismissed on motion for summary judgment (C.A. App. 33) ("C.A. App." refers to the appendix filed in the court of appeals).

[2]The petition for a writ of certiorari does not raise the issues whether the discharge was arbitrary and capricious or discriminatory.

[3]Although the district court assumed that 5 C.F.R. 315.804 (1977) applies here, this civil service rule has been held to be inapplicable to postal employees under Section 410(a) of the 1970 Postal Reorganization Act, 39 U.S.C. 101 *et seq.* *Biondo* v. *Bailar*, 548 F.2d 301, 304 (10th Cir. 1977).

5 C.F.R. 315.804 (1977) provides that "[t]he information in the notice as to why the employee is being terminated shall, as a minimum, consist of the agency's conclusions as to the inadequacies of his performance or conduct." Courts have followed the plain meaning of the regulation in determining whether notice has been adequate. *Jenkins* v. *United States Post Office*, 475 F.2d 1256, 1257 (9th Cir.), cert. denied, 414 U.S. 866 (1973) (postal employee informed by letter that she was terminated for "failure to meet minimum standard requirements"). See also *Medoff* v. *Freeman*, 362 F.2d 472, 474 (1st Cir. 1966), and *Harrington* v. *United States*, 673 F.2d 7, 10 (1st Cir. 1982). The notice to petitioner indicating unsatisfactory performance during his probationary period was thus sufficient to meet the requirement of 5 C.F.R. 315.804 (1977).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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[4]Petitioner's claim that he had no actual notice of the reasons for his discharge (Pet. 7) is belied by the district court opinion. As the court noted, many of petitioner's work-related deficiencies were discussed with him (see Pet. App. B-4 to B-5; II Tr. 278-316) and petitioner conceded at trial that these incidents were brought to his attention when they occurred, that he was given an opportunity to explain his conduct, and that he was further instructed on how to do each task properly (I Tr. 19-25, 27-39, 46-82, 87). Cf. *Codd* v. *Velger*, 429 U.S. 624, 628 (1977). Thus, petitioner's claim would fail even under the standards applicable to non-probationary employees. See *Greenway* v. *United States*, 175 Ct. Cl. 350, 358-359, cert. denied, 385 U.S. 881 (1966) ("[i]f one is well aware of what he is being charged with, complaints as to ambiguity or lack of specificity will be rejected"); *Connelly* v. *Nitze*, 410 F.2d 416, 424 n.10 (D.C. Cir. 1968) (notice "adequately apprised [petitioner] of what he [was to] defend against — and that is the central standard by which notice is to be measured").